IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2393 OF 2005

IN

SUIT NO.2243 OF 2005

AND

SUIT NO. 2243 OF 2005

1.Kalpesh Kanubhai Shah
& others. ...Plaintiffs.

vs.

1.Dr.Deepak Gamanlal Dalal
& others. ...Defendants.

Mr.A.Y.Bookwala with Mr.Shukla i/b. S.P.S.Legal, for Plaintiffs.

Mr.M.P.S.Rao with Ms.Pratibha Mehta i/b. M/s.Little & Co., for Defendants.

CORAM: D.K.DESHMUKH,J.

DATED: 2nd April, 2007.

P.C.:-

1. This is a notice of motion taken out by the plaintiffs. The plaintiffs have filed the suit under Section 6 of the Specific Relief Act for a decree of possession in relation to a flat on the fourth floor of the building. The facts that are necessary for deciding this suit are that, according to the plaintiffs, they are the flat purchasers and the defendants are the owners of the building known as Mahalaxmi Building situated at Plot no.S/6, Kapol Co-op. Housing Society, 12th Road, JVPD Scheme, Juhu, Mumbai. According to the averments in the plaint, the defendants agreed to sell the flat admeasuring 1552 sq.ft. (built up) on the fourth floor of the said building to the plaintiffs for the consideration of Rs.65 lakhs. From April,2004 to June,2004 the plaintiffs paid the said amount of Rs.65 lakhs by cheques on various dates to the defendants. After making full payment of the consideration, the plaintiffs requested the defendants to execute the

agreement to complete the transaction. The defendants requested them to appoint M/s.Pandya Gandhi & Co. as a common solicitors for preparation of the final document. In July,2004 on receiving the full consideration, the defendants handed over possession of the flat to the plaintiffs. Thereafter, they appointed M/s.Pankaj Chothani & Associates as interior designers for carrying out interior work in the flat. After getting the possession of the flat in July,2004 the plaintiffs have started paying the electricity bill of the flat. According to the averments in the plaint, the defendants despite the plaintiffs' repeated request did not execute the sale deed. In February 2005, according to the plaintiffs, the common solicitors handed over the draft of the agreement to the plaintiffs. The agreement was then finalised. The plaintiffs were also to pay the stamp duty. According to the plaintiffs, they have paid stamp duty on 17.2.2005. After receiving the final agreement after franking of stamp duty, the plaintiff signed the final agreement and sent it to the defendants for their signature and requested the defendants to fix a date for the registration of the

agreement. According to the plaintiffs, the defendants thereafter in the month of March,2005 changed their Solicitors and the plaintiffs were issued a letter by the new solicitors of the defendants raising various disputes while acknowledging the receipt of the stamped agreement. Then correspondence was exchanged between the parties. According to the plaintiffs, in the meanwhile work of interior in the flat was going on. It was being carried out by the interior designer appointed by the plaintiffs. According to the plaintiffs, on 18.8.2005 in the morning the defendants alongwith other family members manhandled the workmen who were carrying out the work and took possession of the flat. The plaintiffs have therefore filed this suit under Section 6 of Specific Relief Act for decree of possession. The plaintiffs have filed various documents in support of their claim showing that the plaintiffs were in possession of the flat in August,2005 when the plaintiffs were dispossessed without adopting due process of law.

2. The plaintiffs in this suit have taken out the notice of motion seeking order for appointment of receiver on the flat so that the plaintiffs can be put in possession of the flat. The plaintiffs also pray for other interim reliefs. The Court initially by order dated 26.8.2005 appointed Receiver only for preparing the inventory. Thereafter, by order dated 12.9.2005 the Receiver was appointed to take possession of the flat. Against the ad-interim order appointing the Receiver, an appeal no.857 of 2005 was filed. That appeal was disposed of by order dated 11.10.2005. It appears from the order that before the Appeal Court both the parties agreed for sealing of the premises by the Court Receiver. Thus, presently the flat is under the seal of the Receiver.

3. The learned Counsel appearing for plaintiffs submits that because this is a suit filed under Section 6 of the Specific Relief Act, the plaintiffs have to establish that it was the plaintiffs who were in possession of the flat. It is the case of the plaintiffs that the plaintiffs were put in possession of the flat in July,2004 and that the plaintiffs were

dispossessed by the defendants without adopting due process of law in August,2005. The learned Counsel appearing for plaintiffs relies on the correspondence exchanged between the parties. The learned Counsel relies on the letter dated 22.3.2005 addressed to the plaintiffs by the Solicitors of the defendants and points out that the defendants have themselves stated in that letter that the plaintiffs have started carrying on interior work in the flat. The learned Counsel then invited my attention to the letter dated 23.4.2005 from the defendants to the plaintiffs to contend that the defendants also asked the plaintiffs to carry on the work only in the premises on the fourth floor. According to the learned Counsel, those letters show that it was the plaintiffs who were in possession of the flat in the month of March, and April,2005. The learned Counsel appearing for plaintiffs submits that it is clear from the correspondence exchanged between the parties which is placed by the plaintiffs on record that there was a transaction entered into between the parties in relation to the flat on the fourth floor and that the plaintiffs were also put in possession of that flat.

The learned Counsel submits that as per the affidavit filed in reply to the notice of motion on behalf of the defendants, the defendants had constructed building on the plot comprising of ground plus one floor but Sadguru Builders & Developers of which the plaintiff no.1 is a partner approached the defendants for construction of five additional floors over and above their existing ground plus first floor structure and to consume the balance FSI. According to the defendants, this work was given to that firm of which the plaintiff no.1 is a partner. The construction was to be carried out by Sadguru Builders and Developers, but the flats were to be sold by the defendants. According to the defendants, as per this agreement the building was constructed. From the reply, it appears that there was some dispute about the area between the defendants and the builder Sadguru Builders & Developers. The learned Counsel submits that in the affidavit filed in reply, the defendants admit receipt of Rs.65 lakhs from the plaintiff no.1, but according to the defendants, that amount was paid by the plaintiff no.1 to the defendants as a loan so

that the defendants could pay of the partnership firm which had constructed the building. The learned Counsel appearing for plaintiffs submits that the defendants have totally denied that there was any transaction for sale of the flat on the fourth floor with the plaintiffs. So far as the possessory aspect is concerned, according to the defendants one set of keys of the flat nos.2, 3 and 4 were handed over to the developer-firm to carry on the construction at site. According to the defendants, taking advantage of the position that the developer is in possession of one set of keys, the plaintiffs might have carried out work of furniture etc. surreptitiously. So far as the interior work carried out in the flat no.4 is concerned, the defendants have taken a stand that the work was being carried out not for that flat but the furniture work of some other flat was prepared in that flat. They flatly denied that any work of interior was being carried out in the said flat. The learned Counsel submits that as from the documents produced on record and the pleadings of the parties it becomes now an established position that it is the plaintiffs and not the defendants who were in

possession of the flat this Court should pass a decree in exercise of its power under Rule 6 of Order 12 of the Civil Procedure Code instead of deciding the notice of motion.

4. The learned Counsel appearing for defendants submits that though in the affidavit in reply the defendants have totally denied that there was even any talk about the sale of flat no.4 between the plaintiffs and the defendants, according to the learned Counsel, it does appears from the correspondence on record that there were negotiations going on about the sale of flat no.4 by defendants to the plaintiffs. So far as the aspect of the possession of the flat is concerned, the learned Counsel submits that since the work of construction was carried on by Sadguru Builders and Developers the firm of which the plaintiff no.1 is the partner, the plaintiff no.1 taking advantage of his position as partner of the construction firm was carrying out some work in the flat. But on the basis of that it cannot be said that it was the plaintiffs who were in possession of the flat. In so far as the request

made by the learned Counsel appearing for plaintiffs that instead of passing order on the notice of motion, a decree on admission under the provisions of Order 12 Rule 6 of C.P.C. should be passed, no submissions were advanced by the learned Counsel appearing for defendants. Even, when I pointed out to the learned Counsel the letters addressed by the defendants to the plaintiffs which clearly indicate that it was the plaintiffs who were in possession of the flat and that though those letters are referred to in the plaint and copies of the letters are also filed on record, the defendant have not taken any stand in relation to those letters, the learned Counsel admitted that the defendants in their reply have not said anything about those letters. It is to be noted that the learned Counsel did not say that the defendants want to file any affidavit in relation to those letters. The learned Counsel, however, made submissions on the interpretation of those letters.

5. Now from the submissions made on behalf of both the sides, it is clear that in view of the pleadings that are on record and the documents that

have been placed on record, the learned Counsel appearing for plaintiffs submitted that instead of deciding the notice of motion and keeping the suit pending, this being a suit filed under Section 6 of the Specific Relief Act and in view of the admission found in the documents produced on record, a decree on admission should be made under the provisions of Order XII Rule 6 of the Civil Procedure Code. Rule 6 of Order XII of C.P.C. reads as under:-

> “Order XII Rule 6: Judgment on admissions:-
>
> (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
>
> (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in

> accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

Perusal of the above quoted provisions makes it clear that when Court finds that the facts which are relevant for making a decree in favour of the plaintiffs have been admitted either in the pleadings or the relevant facts appear to have been admitted from the documents produced on record, the Court can at any stage of the suit even on its own motion and without waiting for determination of any other question between the parties can pass a decree on admission. This is a suit filed under Section 6 of the Specific Reliefs Act in relation to the flat. Section 6 of the Specific reliefs Act reads as under:-

> "6. Suit by person dispossessed of immovable property – (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming

through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought-

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recovery possession thereof."

Perusal of the above quoted provision shows that if Court finds that any person who was in possession of immovable property has been dispossessed without his consent otherwise than in due process of law, the Court can make a decree of possession in favour of the said person. The Court in such a situation is

not required to enquire into the aspect of title. The Court is not required to enquire whether that person was entitled to be in possession. Perusal of the above provisions further makes it clear that a person who may be entitled to be in possession in law can institute a suit for getting decree of possession against any person who may be placed in possession because of the decree passed by the Court. It is, thus, clear that the only fact which is relevant for deciding this suit is whether as claimed by the plaintiffs in the month of August,2005 it was the plaintiffs who were in possession of the flat ?. Perusal of the plaint shows that in paragraph (12) the plaintiffs refer to the letter dated 22.3.2005 received by the plaintiffs from the defendants. Perusal of the reply filed in the notice of motion shows that the defendants have not dealt with the contents of paragraph (12) of the plaint, and therefore, they have omitted to say anything about the letter at “Exhibit J” which is referred to in paragraph 12 of the plaint. The paragraphs 4, 5 and 6 of that letter which are relevant. They read as under:-

"4. Our clients further state that you have started carrying out the interior work in the said premises without the consent or authority of our clients. It appears that you have carried out several unauthorised changes in the premises which are not in accordance with the plans approved by the Municipal Corporation of Greater Bombay. It is therefore, absolutely necessary that the premises is restored in accordance with the approved plans and no unauthorised alterations are made therein. You are also aware that our clients have taken indemnity from other two tenants to safeguard the interest of our clients before putting the said tenants in possession and allowing them to carry out even interior works in their respective premises. You are also required to execute such indemnities in favour of our clients.

5. Our clients further note that during the course of carrying out

> the work in the said premises you have stored material and other items on the 5th floor and the same are also lying scattered in the compound of the building.
>
> 6. We therefore, hereby call upon you to forthwith clear the compound of the building as also the 5th floor by removing all your materials/belongings and restore the 4th floor premises strictly in accordance with the plans approved by the MCGB. After you comply with the said requisitions, our clients will consider the agreement received from you and may execute the same subject to the amendments therein to ensure that all the statements contained therein are factually correct and in accordance with the documents on record. (emphasis supplied)"

Perusal of paragraph 4 quoted above shows that the defendants complained that the plaintiffs have started carrying out interior work in the flat without the consent and authority of the defendants.

It is stated that it appears that the plaintiffs are carrying out unauthorised changes in the flat. It is further stated that the defendants have taken indemnity from other two tenants before putting those tenants in possession and before allowing them to carry out interior work in their premises. The defendants state that the plaintiffs are also required to execute such indemnity in favour of the defendants. This clearly means that like other tenants, the plaintiffs have also been put in possession of the flat though other tenants were put in possession of the flat after taking indemnity, the plaintiffs have been put in possession without taking indemnity. Perusal of para 5 shows that there is complaint made that while carrying out work on the fourth floor flat the plaintiffs have stored material and other items on the fifth floor. Perusal of para 6 shows that the defendants called upon the plaintiffs to remove the material lying on the fifth floor and in the compound of the building and to restore the fourth floor premises strictly according to the plan approved by the Corporation. It is obvious that had the plaintiffs not been put in

possession of the flat by the defendants, there was no question of the plaintiffs carrying out any interior work in the flat and there was no question of defendants asking the plaintiffs to restore the flat no.4. What is pertinent to be noted is that this letter is addressed to the plaintiff no.1 and not to the partnership firm. This letter has been referred to and relied upon by the plaintiffs in the plaint, a copy of that letter has also been produced with the plaint. But the defendants have, as admitted by the learned Counsel appearing for defendants, chosen not to deal with that letter. The conduct of the defendants of just ignoring the letter which is in terms relied on by the plaintiffs shows that they were not in a position to deny the contents of the letter, and therefore, in my opinion, from that letter it becomes an admitted position that at least in March,2005 it was the plaintiffs who were in possession of flat no.4. The plaintiffs in para 14 of the plaint have referred to the letter dated 21.4.2005 addressed by the plaintiff no.1 to the Solicitor of the defendants stating therein that he has already prepared the final agreement and paid

stamp duties on the agreements and has made full payment of the consideration and still the agreement is not being registered and because of that he is in trouble in carrying out the work in the flat. Paragraph 14 has been dealt with by paragraph 11 of the reply filed on behalf of the defendants. Perusal of that reply shows that the only fact denied by the defendants is that the entire consideration has been paid by the plaintiffs to the defendants. In my opinion, paragraphs (1) and (2) of the letter at "Exhibit L" to the plaint are relevant, which read as under:-

> "In pursuance of our letter dated 2nd April,2005, I would like to inform your good self that I have not yet receive your reply and I am in trouble to carry out the work ahead.
>
> Yet again I would like to state that I have paid the full amount for the said Flat and the content of the said Agreement is exactly the same, in its form of the two agreement made with the two other

> tenants. And which was already approved by your client."

Perusal of paragraph (1) of the letter shows that in the absence of registration of the agreement, the plaintiffs are finding it difficult to carry out further work on the flat. The letter dated 21.4.2004 at Exhibit L to the plaint has been replied to by the defendants by their letter dated 23.4.2005. In the reply, the defendants state thus:-

> "As regards the changes carried out in the above premises, our clients do not admit that the changes are authorized or that the same are in accordance with the approved plans. In any event, our clients will be satisfied if you could furnish a certificate from an independent architect confirming that the work carried out in the abovementioned premises is strictly in accordance with the plans approved by the Municipal Corporation of Greater Bombay and they do not in any manner adversely affect the

interest of our clients as the co-owners of the property.

It is significant to note that on the one hand you are confirming that the work is being carried out on in the terrace on the 5th floor and in the same para you are denying that the material is lying scattered on the 5th floor terrace. As far as the material is concerned, you are hereby requested to keep the same in one corner of the terrace so that rest of the portion can be used by our clients without any hindrance or disturbance. Similarly, our clients should also be able to peacefully use the entire constructed area on the 5th floor. As far as possible, you are requested to carry on work only in the premises on the 4th floor and not to use any other part of the building or the property. (emphasis supplied)"

6. It is clear from the above quoted portion that the defendants have clearly admitted that the

plaintiffs are carrying out work in the fourth floor flat and the defendants have asked them to produce certificate of independent architect to show that the work that they have carried out on the fourth floor flat is not contrary to the sanctioned plan and the plaintiffs have been asked to restrict themselves to the flat on the fourth floor only. The letter also shows that the defendants were using fifth floor of the building, and the plaintiffs, as suggested by the defendants, were carrying on work on the fourth floor and as the material was kept on the fifth floor, the plaintiffs were asked to keep the material in one corner of the terrace so that the defendants can use that flat. In my opinion, the statements made in the letter dated 23.4.2005 which is a document of the defendants themselves leaves one in no doubt that in the month of March, and April,2005, even according to the defendants, it was the plaintiffs who were in possession of the flat. What is more significant to note, in my opinion, is the conduct of the defendants of not dealing with their own letters which were relied on by the plaintiffs. Their conduct shows that they have omitted to say anything about those letters

because they were in no position to say anything about those letters except admitting that even according to them the plaintiffs were in possession of the flat at the relevant time. It is nobody's case, not even the case of the defendants, that after March and April,2005, the plaintiffs voluntarily handed over the possession of the flat on fourth floor to the defendants. Therefore, it is to be assumed that the plaintiffs who were in possession of the flat in March and April,2005 continued to be in possession of the flat till August,2005 when they were dispossessed, and therefore, in my opinion, it is clear from the documents of the defendants themselves which have been referred to above that the defendants admit that the plaintiffs were in possession of the said flat. It has to be pointed out here that when the learned Counsel appearing for plaintiffs prayed for decree on admission under Order 12 Rule 6 of C.P.C. and when it was pointed out to the defendants that they have not said anything about their letters in their reply, time was not even asked for submitting further affidavit dealing with those letters. This, in my opinion, shows that the

defendants are not in a position to deny the contents of those letters. In this view of the matter therefore, in my opinion, it will not be appropriate to keep this suit pending as it is clear that from the letters of the defendants themselves that the plaintiffs were in possession of the flat on the fourth floor at the relevant time. It is further to be seen that it is only a suit under Section 6 of the Specific Relief Act. Therefore, it is always open to the defendants, if according to them they are entitled to the possession of the flat, to institute their own suit establishing their title and to pray for a decree of possession. In my opinion, considering that the plaintiffs were in possession of the suit flat at the relevant time and considering the nature of the suit, it will not be appropriate to keep the suit pending. The suit of the plaintiffs, is therefore, decreed in terms of prayer clause (a) and (f).

7. At the request of the learned Counsel appearing for defendants, execution of the decree is stayed for a period of four weeks.

8. In view of the above order, notice of motion no.2393 of 2005 does not survive for consideration, hence, disposed of. The Receiver appointed by the ad-interim order is discharged without passing accounts. It is, however, directed that in case the Receiver does not receive any order from the superior Court staying the execution of the decree of possession passed in the suit today, or setting aside the decree, the Receiver shall hand over possession of the flat which is presently with the Receiver to the plaintiffs.